Pegasus Broadcasting of San Juan, Inc. d/b/a WAPA-TV *and* Union de Periodistas y Artes Graficas y Ramas Anexas, Local 225, The Newspaper Guild, AFL–CIO, CLC. Case 24–CA–6934

July 20, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On March 22, 1995, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pegasus Broadcasting of San Juan, Inc. d/b/a WAPA-TV, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(5) of the Act by not granting merit salary increases in January 1994. In so doing, we emphasize that this case, like *Daily News of Los Angeles*, 315 NLRB 1236 (1994), on which the judge relies, involves the discontinuance of an established practice of granting merit increases. We, however, disavow the judge's reliance on his finding that the range of merit increases given by the Respondent in past years was comparable to the range of increases in *Daily News*.

Magdalena S. Revuelta, Esq., for the General Counsel.
Francisco Chevere, Esq., of San Juan, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Hato Rey, Puerto Rico, on January 19, 1995. On a charge filed on May 12, 1994, and subsequently amended, a complaint was issued on June 30, 1994, alleging that Pegasus Broadcasting of San Juan, Inc. d/b/a WAPA-TV (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing to grant a merit salary increase to its reporters in January 1994. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on March 3, 1995. On the entire record of this case, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation authorized to do business in Puerto Rico, is engaged in operating a television station known as WAPA-TV. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Union de Periodistas y Artes Graficas Ramas Anexas, Local 225, the Newspaper Guild, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The sole issue in this proceeding is whether Respondent violated the Act by not granting a merit salary increase to its reporters in January 1994. The facts are undisputed. All relevant facts were stipulated by the parties.

The Union was certified on February 2, 1993, as the exclusive collective-bargaining representative of a unit consisting of all reporters and reporter-anchor persons employed by Respondent at its television station facilities located in Puerto Rico. Respondent has granted annual salary increases to its reporters for the last 18 years. Throughout the years the practice has been to grant the increases based on merit, after the employees had been evaluated. For at least the 4 years prior to 1994, the salary increases were made effective in January of each year. The amount of the increases varied among the employees. In 1990 the increases ranged from 3 to 7.3 percent; in 1991 increase ranged from 3 to 8 percent; in 1992 increase ranged from 4.9 to 6 percent; and in 1993 all the increases were 1 percent. As of January 1994 Respondent and the Union had begun negotiations for a collective-bargaining agreement. Respondent did not grant salary increases to its reporters in 1994 and Respondent did not notify the Union of its decision to discontinue granting the annual wage increase.

Discussion and Conclusions

An employer negotiating with a *newly* certified bargaining representative is prohibited under Section 8(a)(5) of the Act from altering established terms and conditions of employment without first notifying and bargaining with the union. *NLRB v. Katz*, 369 U.S. 736 (1962). In *Daily News of Los Angeles*, 315 NLRB 1236 (1994), the Board made clear that a discontinuance of merit raises constitutes a violation of Section 8(a)(5). The Board stated (at 1239):

> [T]he Board has consistently supplied *Katz* to prohibit an employer from unilaterally changing an existing term and condition of employment during bargaining, regardless of whether the change involved a continuance or discontinuance of the existing term.

While Respondent maintains that the increases are discretionary, in its brief Respondent concedes that it maintains an ''established pattern of increases that is fixed as to timing but discretionary as to amount.'' In this connection, the

Board stated in its original *Daily News* decision, 304 NLRB 511 (1991),[1] ''Once the judge found that the Respondent had a 'pattern and practice of evaluating the unit employees at the time of each employee's anniversary date,' he correctly concluded that the Respondent was required to maintain that practice.'' The Board continued (id.):

> Although the judge found that the amount that an employee would receive was discretionary, he found that the *timing* of the increase—at the employee's annual evaluation—was not discretionary and thus that the merit wage program had become an established term and condition of employment.

Respondent also maintains that it is caught in the horns of a dilemma and that ''Respondent would have violated Section 8(a)(5) of the Act had it granted salary increases to the reporters while conducting bargaining negotiations with the Union.'' The Board has found this fear to be unfounded. *Hyatt Regency Memphis*, 296 NLRB 259, 286 (1989), enfd. in part and remanded in part on other grounds 939 F.2d 361 (6th Cir. 1991). As pointed out in that decision, the question was resolved in *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970), where the court stated:

> At first glance it might appear that the employer is caught between the proverbial ''devil and the deep blue sea.'' It is an unfair labor practice to grant a wage increase during the campaign and bargaining periods, but at the same time it may be an unfair labor practice to refuse to grant an increase during this same period. Indeed, the employer in this case has made just this sort of an argument, claiming that it could not grant the pressroom employees their normal progression raises since to do so would have been an unfair labor practice. We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation in that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.

In *Daily News of Los Angeles*, above at 514, in 1986 approximately 18 percent of the employees received no increase, while the remaining employees received icreases ranging from 2 to 20 percent. For 1986 to 1989, about 40 to 50 percent of the unit employees received increases from 3 to 5 percent. In the instant proceeding their increases were well within the range of increases in *Daily News*. In 1990 the increases ranged from 3 to 7.3 percent; in 1991 the increases ranged from 3 to 8 percent; and in 1992 the increase ranged from 4.9 to 6 percent. In 1993 those employees receiving increases all received an increase of 1 percent. Accordingly, I find that by not granting a merit salary increase to its reporters in January 1994, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative of Respondent's employees in the following appropriate unit:

> All reporters and reporter-anchor persons employed by Respondent at its television station facilities located in Puerto Rico.

4. By unilaterally withholding wage increases from employees Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of he Act.

Having withheld its annual merit increase, I shall order Respondent to make whole its bargaining unit employees for any loss of earnings suffered because of Respondent's having withheld such increase. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] The General Counsel has proposed that an average of the merit increases granted to each employee for the past 4 years be used to determine the amount owed. I believe, however, that the formula to be used would be best left for the compliance stage of this proceeding. See *Daily News*, supra, 315 NLRB 1236; *Hyatt Regency Memphis*, supra at 259 fn. 2.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

The Respondent, Pegasus Broadcasting of San Juan, Inc. d/b/a WAPA-TV, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unilaterally withholding annual merit wage increases from the employees in the appropriate bargaining unit. The unit employees include all reporters and reporter-anchor persons employed by Respondent at its television station facilities located in Puerto Rico.

(b) In any any like or manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policie of the Act.

(a) Make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of Respondent's unilateral withholding of annual wage in-

[1] Remanded 979 F.2d 1571 (D.C. Cir. 1992).

[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1988 amendment to 26 U.S.C. § 6621.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

creases, with interest, in the manner set forth in the section remedy of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Puerto Rico, in English and in Spanish, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally withhold annual merit wage increases from the employees in the appropriate bargaining unit. The unit employees include all reporters and reporter-anchor persons employed by Respondent at its television station facilities located in Puerto Rico.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL NOT make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of Respondent's unilateral withholding of annual wage increases, with interest.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

PEGASUS BROADCASTING OF SAN JUAN, INC.
D/B/A WAPA-TV